

1 RONALD J. TENPAS
 2 Assistant Attorney General
 3 Environment and Natural Resources Division
 4 United States Department of Justice
 5 DAVID B. GLAZER (D.C. 400966; MD)
 6 Natural Resources Section
 7 Environment and Natural Resources Division
 8 United States Department of Justice
 9 301 Howard Street, Suite 1050
 10 San Francisco, California 94105
 11 Telephone: (415) 744-6491
 12 Facsimile: (415) 744-6476
 13 E-mail: david.glazer@usdoj.gov

14 Attorneys for the United States of America

15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 OAKLAND DIVISION

18	_____)	
19	PLANNING ASSOCIATION FOR)	
20	RICHMOND, <i>et al.</i> ,)	
21)	
22	Plaintiffs,)	
23)	
24	v.)	No. C-06-02321-SBA
25)	SETTLEMENT AGREEMENT (Amended)
26	U.S. DEPARTMENT OF VETERANS)	
27	AFFAIRS,)	Date: N/A
28)	Time: N/A
29	Defendant.)	<u>Hon. Sandra Brown Armstrong</u>
30	_____)	

31 Plaintiffs Planning Association for the Richmond and Friends of Lands End and
 32 Defendant U.S. Department of Veterans Affairs (collectively, the "Parties") have reached the
 33 following settlement in this matter and agree as follows, subject to Court approval.

34 RECITALS

35 1. Plaintiffs filed their Complaint in this matter on March 31, 2006, seeking declaratory

36

1 and injunctive relief under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§
2 4321–4370f, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. Plaintiffs
3 challenge Defendant’s proposal to construct an approximately 7,600 sq. ft., two-story
4 structure (the “Building 16 Annex” or “Annex”) on a vacant lot located near the southern
5 perimeter of the San Francisco Veterans Affairs Medical Center Campus (the “VAMC” or
6 “Campus”), off Clement Street, in the northwestern corner of the City of San Francisco. The
7 construction of the Annex is needed to house only those prostate and urology laboratories
8 (together with certain administrative functions) that will be displaced by ongoing work to
9 seismically upgrade the Campus’s Building 203 hospital wards in accordance with federal law
10 and to provide greater patient privacy and disabled access.

11 2. Defendant had originally relied upon statutory categorical exclusion from
12 environmental review for the Building 203 upgrade/Building 16 Annex project, but subse-
13 quently elected to perform an Environmental Assessment (“EA”) for the project. The Annex
14 was also scaled back from the originally planned 14,400 sq. ft. to only 7,600 sq. ft. The VA
15 completed its draft EA on January 15, 2007, and noticed its availability for review and public
16 comment. The final EA and Finding of No Significant Impact (“FONSI”) were issued on
17 April 13, 2007.

18 3. Plaintiffs have challenged the Building 16 Annex proposal, asserting that
19 Defendant’s environmental analysis unlawfully “segments” consideration of the project from
20 two larger concerns, including other projects potentially under consideration at the VAMC
21 and the limited availability of parking at the Campus. Plaintiffs contend that Defendant
22 should have prepared an Environmental Impact Statement (“EIS”) under NEPA for the
23 Annex project, which should have addressed other potential projects and concerns at the
24 Campus, as well.

25 4. Rather than litigating the merits of Plaintiffs’ claims, the Parties have negotiated a
26

1 settlement of the litigation, which they hereby submit to the Court for its approval (the
2 “Settlement Agreement”).

3 5. This Court has jurisdiction over the subject matter of this action and over the parties,
4 pursuant to 28 U.S.C. § 1331, because this action arises under the laws of the United States,
5 including NEPA, and involves the United States as a defendant under the APA. The parties
6 consent to and shall not challenge entry of this Settlement Agreement. Thereafter, the Court
7 retains jurisdiction solely to resolve disputes concerning implementation of this Settlement
8 Agreement (“Disputes”) until such time as the EIS described in Paragraph 14, below, is
9 completed, a Record of Decision is issued, and any pending Disputes are resolved. Any such
10 Dispute shall be resolved in accordance with the procedures set forth in Paragraph 20, below.

11 However, the parties expressly agree that any claim Plaintiffs may bring relating to any final
12 agency action taken by Defendant, including but not limited to the actions contemplated
13 under NEPA and the National Historic Preservation Act as described in Paragraphs 14 and
14 15, below, shall be the subject of a new complaint.

15 6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

16 BUILDING 16 ANNEX PROJECT

17
18 7. Construction. Subject to the mitigation measures described in Paragraphs 8–11,
19 below, Defendant may proceed with the Building 16 Annex project as proposed, and
20 Plaintiffs will not challenge that project, except as expressly provided in this Settlement
21 Agreement. The Building 16 Annex shall be constructed to meet the seismic requirements
22 for all VA buildings, Standard H-18-8. Defendant shall promptly inform the plaintiffs of any
23 effort made by the VA to work with the San Francisco Fire Department or other City
24 department to formalize procedures for ensuring access by emergency vehicles to Building
25 16 and the Annex.

1 8. Mitigation. To address the Plaintiffs' concerns, the Defendant agrees to meet the
2 following criteria in the design, construction, and use of Building 16 Annex:

3 a. Noise levels associated with the finished Building 16 Annex,
4 measured at the southern property line, will not exceed 50 dBA from 10 p.m. to 7
5 a.m. and 55 dBA from 7 a.m. to 10 p.m. To accomplish this, the Defendant
6 agrees that it will implement the design standards as set forth in the September
7 26, 2007 Charles M. Salter Associates Inc. Report, attached hereto as Attachment
8 A and fully incorporated herein.
9

10 b. Lighting of the exterior areas will be designed and installed to
11 downshield lights so as to minimize light spill downward and upward. The
12 Defendant will install the lighting fixtures depicted in Attachment B to this
13 Settlement Agreement, and fully incorporated herein, to accomplish that goal.
14

15 c. Windows above the ground floor will be designed and installed at a
16 height that, in the normal course of Building 16 activities, a person standing
17 inside cannot see out of the windows into neighboring lots.

18 d. Parking at the Annex (Lot F) will be limited to no more than ten
19 (10) spaces.
20

21 e. Defendant will install a fence constructed of wood or a suitable
22 wood substitute, generally as depicted in Attachment C to this Settlement
23 Agreement, which is incorporated by reference herein, defining the location
24 and height of, and the construction materials for, the fence. Defendant agrees
25 to regularly maintain the fence to ensure its integrity and solidity, and to plant
26

1 and maintain mature vegetation along the fence. The Defendant further agrees
2 that it will plant and maintain the slope below the wooden fence to the
3 residential property lines as necessary to prevent erosion, and that it will
4 repair and maintain the existing cyclone fence to maintain its structural and
5 visual integrity. The Parties further agree to utilize a Community Meeting
6 forum to resolve any concerns regarding ongoing maintenance called for by
7 this Paragraph.
8

9 9. Defendant will enforce the parking restrictions at Lot F identified in Paragraph 8.d,
10 above, as well as the "no parking" restriction on the access road to Lot F.

11 10. Defendant will make all reasonable efforts to relocate the BSL-2 facilities housed
12 in the Annex to another location within five (5) years from the date that the Building 16
13 Annex is occupied. Defendant shall relocate such facilities within such five-year period,
14 provided that alternative space is approved, funded, and available, after which time the
15 Building 16 Annex will house only administrative functions. If, after five (5) years, such
16 space is not approved, funded, and available, Defendant will not be obligated to seek to
17 relocate the Building 16 Annex facilities.
18

19 11. Training/Employee Awareness. Defendant shall advise its employees periodically,
20 by newsletter or e-mail notification and through new employee orientation processes,
21 concerning parking restrictions at Lot F and the access road and respect for the residential
22 nature of the location of the VAMC facilities, which requires sensitivity to noise and privacy
23 concerns. Defendant will also use that notification procedure to encourage employees to
24 park in designated lots or facilities on the Campus, rather than on neighborhood streets, and
25
26

1 to use public transportation when possible. Defendant will provide the information described
 2 in this paragraph to all contractors scheduled to perform construction or maintenance
 3 activities on the Campus where those activities are anticipated to last greater than one work
 4 day.

5 COMMUNITY OUTREACH

6
 7 12. Within six (6) months of the approval of this Settlement Agreement, Defendant will
 8 include a link on its Website for, and promptly post, the following types of environmental
 9 review documents for proposed projects on the Campus, to the extent the VA is obligated by
 10 law to make such documents available to the public: Categorical Exclusions, Environmental
 11 Assessments, Environmental Impact Statements, Findings of No Significant Impact, Records
 12 of Decision, and notices for and comments on those documents. Defendant agrees to provide
 13 written notice of the initiation of this Web page to Plaintiffs and their counsel. In the event
 14 the VA is not authorized by law or policy directive to post these documents on a Web site,
 15 the VA agrees in the alternative to make this same category of documents available to the
 16 public in an alternative electronic format and to provide written notice to the Plaintiffs and
 17 their counsel as to the manner in which the public may obtain the documents.

18 13. Community Meetings. Beginning the first calendar quarter after the approval of this
 19 Settlement Agreement, Defendant will hold the first of quarterly community meetings, to be
 20 held quarterly thereafter for a period of three (3) years following approval of this Settlement
 21 Agreement. Such meetings shall be open to the public. Defendant will provide written
 22 notice of these meetings to Plaintiffs and their counsel. If needed, Defendant will provide a
 23 professional facilitator to conduct the meetings. These meetings are not intended to excuse
 24 or replace any notice and public review requirements imposed upon the Department of
 25 Veterans Affairs by applicable laws, including NEPA and the APA.

INSTITUTIONAL MASTER PLAN AND EIS

14. Master Plan and EIS. Within 30 months of the date of approval of this Settlement Agreement, Defendant will complete an Institutional Master Plan (“IMP”) and an EIS supporting the IMP, addressing the VAMC and potential projects under consideration at the Campus, to the extent reasonably foreseeable. Defendant will provide a sixty-day (60-day) public review and comment period for the EIS. Defendant agrees to provide written notice of the review process for the EIS to Plaintiffs and their counsel. The IMP and EIS will include, among other things, (1) an analysis of parking, including parking of VA-related vehicles on the campus and surrounding area, and potential mitigation measures, and (2) analysis of possibilities for relocation of the Annex research functions to another location.

a. The EIS will not cover the following projects, which Plaintiffs, in consideration of this Settlement Agreement, pledge not to challenge:

1. Seismic upgrades to Buildings 9, 10, 11, and 13. Buildings 9, 10 and 11 were determined to be eligible for the National Register of Historic Places, and Building 13 was determined to contribute to that eligible status. Defendant agrees to comply with applicable requirements of section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f. The VA will concurrently send its application for review of the seismic retrofit project to the State Historic Preservation Office (“SHPO”) and to the Advisory Council on Historic Preservation for comment on the project, with copies to the Plaintiffs. Defendant agrees to develop and issue for public review an Environmental Assessment under NEPA for these projects and to provide written notice of the review process to Plaintiffs and their counsel.

2. Emergency Room upgrade.

3. Clinic expansion (to be built above the Emergency Room).

4. 800 sq. ft. modular building (to be constructed adjacent to Building 18).

b. As to any other projects that may be funded between approval of the Settlement

1 Agreement and completion of the EIS and where those funds would be deobligated if not
 2 used within a specified time frame, the parties shall meet and confer concerning whether
 3 such projects may be excluded from the EIS and not subject to challenge. If the parties do
 4 not reach an agreement, each party reserves any rights it has as to such projects.

5 15. Defendant agrees to resubmit a completed National Register of Historic Places
 6 Registration Form to the appropriate entity within six (6) months of the approval of this
 7 Settlement Agreement.

8 16. All notices and submissions required by this Settlement Agreement shall be sent by
 9 express mail or similar overnight mail delivery service with return receipt or confirmation of
 10 delivery, addressed to the persons identified below. Notices and submissions may be e-
 11 mailed, but such communication is effective only when the addressee confirms receipt of the
 12 e-mail and its attachments, as applicable, by reply e-mail.

13 Where Notification/Submission to Plaintiffs is Required:

14
 15 Ron Miguel
 16 President
 17 Planning Association for the Richmond
 3145 Geary Blvd., #205
 San Francisco, CA 94118-3300
 rm@well.com

18 Julie Burns
 19 Friends of Lands End
 20 3755 Balboa St., #201
 San Francisco, CA 94121
 julieburns@sealrock.com

21 Where Notification/Submission to Plaintiffs' Counsel is Required:

22 Sharon E. Duggan
 23 Law Offices of Sharon E. Dugan
 24 370 Grand Ave., Ste. 5
 Oakland, CA 94610-4874
 Phone: (510) 271-0825
 25 FAX: (510) 271-0829
 Email: foxsduggan@aol.com

1 EFFECT OF SETTLEMENT

2 17. Except as expressly stated herein, this Settlement Agreement resolves the claims
 3 pled in the Complaint filed in this action, together with all claims under NEPA or under other
 4 federal, state, or common law, relating to the matters addressed in Paragraphs 7-15, above.
 5 Upon approval by the Court, entry of this Settlement Agreement constitutes entry of
 6 judgment pursuant to Fed. R. Civ. P. 58.
 7

8 18. Except as expressly provided herein, the parties retain all rights that they otherwise
 9 would have, including that (1) Plaintiffs may seek judicial review in a separate lawsuit of the
 10 legal adequacy of the EIS and the IMP as described in Paragraph 14, above; (2) Plaintiffs
 11 reserve their claims as to those projects falling under Paragraph 14.b to the extent unresolved
 12 by the Parties' meet-and-confer efforts; and (3) Plaintiffs reserve any claims under section
 13 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, as to the submission
 14 provided for in Paragraph 15, above. Defendants reserve all defenses as to Plaintiffs'
 15 reserved claims.
 16

17 ATTORNEYS' FEES AND COSTS

18 19. Within 30 days of Court approval of this Settlement Agreement, Defendant agrees to
 19 pay Plaintiffs' attorneys fees and costs in the amount of TWENTY-FOUR THOUSAND
 20 DOLLARS (\$24,000.00), payable to the Law Offices of Sharon E. Duggan, in full settlement
 21 and satisfaction of all of Plaintiffs' claims for attorneys fees and costs arising from this
 22 action.
 23

24 DISPUTE RESOLUTION

25 20. a. In the event a Dispute arises during the pendency of the Court's continuing
 26

jurisdiction as provided in Paragraph 5, above, the disputing party will notify the other party in writing of the nature of the Dispute and, within 30 days after such notification (or additional time if the parties agree), the parties will discuss and attempt to resolve the Dispute. If the parties do not resolve the Dispute within 90 days thereafter, either party may file a motion for resolution by the Court. However, the parties will not seek the remedy of contempt for any alleged violation of this Settlement Agreement.

b. In the event a Dispute arises after termination of the Court's continuing jurisdiction as provided in Paragraph 5, above, Plaintiffs may file a new action seeking relief in accordance with applicable provisions of law.

GENERAL TERMS

21. Nothing in this Settlement Agreement shall constitute, or be construed to constitute, a waiver of sovereign immunity by the United States.

22. Nothing in this Settlement Agreement shall constitute, or be construed to constitute, an admission of liability on the part of the Defendant as to Plaintiffs' claims in this litigation, and approval of this Settlement Agreement by the Court shall not be interpreted to constitute a ruling on the merits or precedent in this or any other case.

23. Nothing in this Settlement Agreement may be modified except by written consent of Plaintiffs and Defendant and approval of the Court.

24. Nothing in this Settlement shall be construed to commit a federal official to expend federal funds not appropriated by Congress. To the extent that the expenditure or advance of any money or the performance of any obligation of the United States under this Settlement is to be funded by appropriation of funds by Congress, the expenditure, advance, or

1 performance shall be contingent upon the appropriation of funds by Congress that are
 2 available for this purpose and the apportionment of such funds by the Office of Management
 3 and Budget. No breach of this Settlement Agreement shall result and no liability shall accrue
 4 to the United States in the event such funds are not appropriated or apportioned.

5 25. This Settlement Agreement constitutes the final, complete, and exclusive agreement
 6 and understanding between the Parties and supersedes all prior agreements and
 7 understandings, whether oral or written, concerning the subject matter hereof. No other
 8 document, nor any representation, inducement, agreement, understanding, or promise,
 9 constitutes any part of this Settlement Agreement or the settlement it represents, nor shall it
 10 be used in construing this Settlement Agreement.
 11

12 26. The Parties agree to a reference to Magistrate Judge Spero, pursuant to 28 U.S.C. §
 13 636(b), for resolution of disputes, pursuant to Paragraph 20.a, arising under this Settlement
 14 Agreement.
 15

16 SO AGREED:

17 FOR THE PLAINTIFFS:

18 Dated: June 6, 2008

/s/SHARON E. DUGGAN
 SHARON E. DUGGAN
 Law Offices of Sharon E. Duggan
 370 Grand Avenue, Suite 5
 Oakland, California 94610
 Telephone: (510) 271-0825
 Facsimile: (510) 271-0829
 E-mail: foxsduggan@aol.com

23 FOR THE DEFENDANT:

24 Dated: June 6, 2008

/s/DAVID B. GLAZER
 DAVID B. GLAZER
 Natural Resources Section
 Environment and Natural Resources Division
 United States Department of Justice

301 Howard Street, Suite 1050
San Francisco, California 94105
Telephone: (415) 744-6491
Facsimile: (415) 744-6476
E-mail: david.glazer@usdoj.gov

IT IS SO ORDERED.

Dated: _6/6/08


HON. SAUNDRA BROWN ARMSTRONG
UNITED STATES DISTRICT JUDGE

ATTORNEY ATTESTATION OF CONCURRENCE

I hereby attest that I have obtained concurrences in this filing for the signatures indicated by a “conformed” signature (“/s/”) within this e-filed document.

Dated: June 6, 2008

/s/DAVID B. GLAZER
DAVID B. GLAZER
Natural Resources Section
Environment and Natural Resources Division
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, California 94105
Telephone: (415) 744-6491
Facsimile: (415) 744-6476
E-mail: david.glazer@usdoj.gov